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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

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## No. 1314

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MARK H. KROLL, *Petitioner,*

v.

UNITED STATES OF AMERICA.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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**PETITIONER'S REPLY BRIEF**

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In response to the Brief for the United States in Opposition, the petitioner emphasizes two factors relevant to this Court's consideration of the Petition:

### 1. The Pendency of the Marion Appeal Justifies Either a Grant of This Petition or a Withholding of Action Thereon

The brief of the Solicitor General mistakenly states (p. 7) that this Court noted probable jurisdiction on March 1, 1971, of the appeal in *United States* v. *Marion,*

No. 810. Actually, this Court postponed the question of jurisdiction to the hearing on the merits, which will occur next Term.[1] Thus, depending on the outcome of the jurisdictional problem, this Court may or may not have to resolve the "relationship between pre-indictment delay and speedy trial or due process claims" (Opp. Br. 7) in the *Marion* appeal.

The uncertainty as to whether this Court will reach the speedy trial issue in *Marion* suggests the appropriateness of granting certiorari in this case and setting the oral argument immediately following the *Marion* argument. As the Solicitor General stated in his Jurisdictional Statement in *Marion* (p. 5), at issue in *Marion* "are several important questions relating to the right to a speedy trial, not yet decided by this Court and not uniformly resolved in the lower courts." And the Solicitor General has not in his Opposition Brief in this case pointed to any significant differences between the "several important questions" in *Marion* and those in the instant case. The grant of certiorari in this case, where there are no jurisdictional hurdles, will thus insure a resolution of the issues that the Government has told this Court are worthy of review. That the

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[1] The appellee in the *Marion* appeal moved to dismiss the appeal on the ground that dismissal of an indictment for unnecessary delay in presenting the charge to a grand jury is not a "decision or judgment" of a district court subject to direct review by this Court under 18 U.S.C. § 3731, as it existed prior to the recent amendment abolishing such direct review. Presumably that is the jurisdictional problem to be overcome before this Court can consider and resolve the merits of the speedy trial controversy in *Marion*.

issues in the two cases are substantially identical is shown by the following comparison:

| *Marion*<br>*Jurisdictional Statement* | *Kroll*<br>*Petition* |
|---|---|
| 1. Question presented (p. 2): "Whether an indictment may properly be dismissed because of pre-indictment delay that was not purposeful, oppressive or actually prejudicial to the defendants." | 1. Question presented (p. 2): "Whether, in assessing the right to a speedy trial under the Sixth Amendment or under Rule 48(b) of the Federal Rules of Criminal Procedure, pre-indictment delays by the Government are to be considered where the indictment is filed within the applicable limitations period."<br>The Government's counter-statement of the question presented (Opp. Br. 2): "Whether the time which elapsed between termination of the fraudulent scheme and the return of the indictment deprived the defendants of their right to a fair and speedy trial." |
| 2. A substantial "threshold matter" is said (p. 5) to be "Whether the alleged commission of an offense and the initiation of criminal proceedings is to be considered at all in a speedy trial claim." As to that matter, lower courts are not in uniform agreement, but most courts "generally look to the statute of limitations as exclusively controlling the question of pre-indictment delay." | 2. The Fifth Circuit, it is here noted (p. 24), has held that the speedy trial rights "do not accrue to a defendant until after a prosecution is initiated" and any delay between commission of the crime and indictment "is controlled by the applicable statute of limitations." Concededly, there are lower court differences of opinion on this matter. |
| 3. The dismissal of the *Marion* indictment, it is said (p. 7), "solely because of pre-indictment delay was erroneous in the instant case," particularly since there was no showing that the Government's delay was "purposeful or oppressive." | 3. Here, the petitioner claims (p. 27), his allegation is uncontradicted on the record "that the Government had known of the alleged crimes years before the filing of the indictment and was thus dilatory, without cause, in seeking the indictment." Such delay is said "to be unreasonable and arbitrary". |

*Marion*
*Jurisdictional Statement*

4. The Government asserts in the *Marion* case (p. 8) that there was no establishment of "serious prejudice to the appellees" even if the delay was purposeful or oppressive. The appellees "were not incarcerated and the only conceivable harm from pre-indictment delay would be increased difficulty in reconstructing relevant evidence which has not been preserved through documentation" — an "inherent prejudice" that has not hitherto been deemed to warrant dismissal save in one "unusual and clearly distinguishable case."

*Kroll*
*Petition*

4. The Petition states (pp. 27-28) that until the proper period for measuring the speedy trial claim has been established, petitioner's proof of prejudice cannot appropriately be assessed. The burden may be on the Government to prove the reasonableness of its delay, rather than on the defendant to prove pre-indictment prejudice. In any event, there are uncontradicted assertions in the record that during the pre-indictment delay many documents essential to the defense became scattered and lost, some witnesses became difficult to find, and the memories of all individuals concerned were dimmed by the passage of time.

The Opposition Brief (p. 8) merely states that the delay here "caused no prejudice" since "No material records were missing, and the witnesses' recollection remained generally clear." But if that assessment of the record is accepted, we have a situation not unlike that in *Marion*, where there is allegedly only "inherent prejudice" in the form of possible "increased difficulty in reconstructing relevant evidence which has not been preserved through documentation."

The parallelism of these two cases at the very least justifies withholding action on the instant petition until this Court has finally acted on the *Marion* appeal. If this Court should reach the speedy trial question in *Marion* and should it affirm the lower court's dismissal of the indictment, the judgment below in this case could

not stand; reconsideration of the matter by the district court or the Fifth Circuit would possibly be in order, depending on the nature and scope of this Court's ruling in *Marion*.[2] Thus, unless the Petition were to be granted as above suggested, withholding of action thereon does become appropriate.

**2. The Importance and Reviewability of the Severance Question Are Not Diluted by the Trial Testimony of the Exculpatory Co-Defendants**

The Solicitor General (Opp. Br. 7) seeks to counter the important question whether a severance is necessary to permit use of exculpatory testimony earlier given by the principal co-defendants, Cahn and Criswell. He does so by reiterating the irrelevant fact that Cahn and Criswell did testify at the trial that petitioner Kroll did not control or dominate ABM—which

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[2] The Solicitor General asserts (Opp. Br. 8) that such reversal "would be inappropriate here" since "there was no undue delay by any test," the statute of limitations being five years and the complexity of the fraud making impossible a quick unraveling by the Government. But one of the questions raised here and in *Marion* is whether a delay shorter than the period of limitations, in a situation involving a complex fraud, can be so unreasonably and seriously prejudicial to the defendant to require relief under the Sixth Amendment or the Fifth Amendment's due process clause. And a necessary part of that question is whether the limitations period or the complexity of the alleged crime can be used to dissipate whatever prejudice may be said to accrue to the defendant by virtue of the pre-indictment delay. As of now, no one can properly or confidently say whether "there was no undue delay [here] by any test."

Moreover, the Solicitor General's assertion (Opp. Br. 8) that the "complex fraud" in this case "could not be unraveled in short order" is undermined by his earlier comment (Opp. Br. 5) that an S.E.C. accountant examined the corporate records in November 1965 and the "resulting evidence was presented to the grand jury in February 1966." Obviously the unraveling was of fairly "short order."

control was the principal and critical factor in the Government's effort to connect Kroll with the conspiracy. At the same time, it is both ironic and significant that the Solicitor General, after asserting (Opp. Br. 5) that ABM "was owned by Kroll," actually concedes in the course of opposing Cahn's petition in No. 1435 that "Cahn was the sole stockholder" of ABM (Op. Br. 5).

But the question put to this Court by petitioner concerns the severance right in relation to the opportunity to use *prior* exculpatory testimony, given by the co-defendants at an earlier time when they were not under the cloud of a criminal indictment. Whatever they may have testified at the trial, the co-defendants were necessarily viewed by the jury as men struggling for their own vindication. It was impossible to give that trial testimony the same weight and credibility that might have attached to earlier testimony given in a civil proceeding freed of all the inhibitions and implications of a criminal proceeding.

And it is in this context of granting severance to permit use of *prior* exculpatory evidence—barred here by the provisions of 11 U.S.C. § 25(a)(10)—that the decision below is in conflict with *United States* v. *Echeles,* 352 F. 2d 892 (7th Cir. 1965). Significantly, the Solicitor General has not denied that conflict. Nor has he denied the importance of the severance problem as related to *prior* exculpatory evidence. See Petition, pp. 17-23.

## CONCLUSION

These reasons, supplementing those in the Petition, justify the grant of certiorari, or at least a withholding of action until the *Marion* appeal, No. 810, has been decided.

Respectfully submitted,

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